of trial was failure-to-stabilize which, under EMTALA, requires generally that a plaintiff present evidence that the patient had an emergency medical condition which was known to the hospital and that condition was not stabilized before the patient was transferred. Multiple medical practitioners, medical experts, and firsthand witnesses testified at the time of a jury trial which took place in April, 2003, presided over by the Honorable Avern Cohn of the Eastern District of Michigan, Southern Division. The jury determined that Botsford failed to stabilize Mr. Smith's emergency medical condition before he was transferred, that the estate of Mr. Smith suffered damages as a direct result of this failure, and that economic damages in the amount of $35,000.00 and noneconomic damages in the amount of $5.0 million should be awarded to Petitioner. The jury's verdict was reduced to a judgment dated May 1, 2003.

Botsford appealed by right to the United States Court of Appeals for the Sixth Circuit, which affirmed in part, reversed in part, and remanded for a reduction of the $5.0 million noneconomic damages award to the damages cap limit of $359,000, in accordance with Michigan law, M.C.L. 600.1483. *Smith v. Botsford General Hospital*, 419 F.3d 513, 521 (6th Cir. 2005).

Material Facts

Trial. When the ambulance brought Kelly Smith to Botsford on October 10, 1998, he was 33 years old and weighed 500-600 pounds. After consuming alcohol and ingesting cocaine, Mr. Smith crashed and rolled his car, and broke his left leg. (6th Cir. Jt. Apx 537-544, 550-551). When he arrived at Botsford around 3:00 a.m., he was given a complete physical examination by the Emergency Room Department Staff (Apx. 988; Apx. 715-793), including assessment and treatment by the attending physician, Dr. Frank Schell, a board certified emergency medical specialist (Apx. 794-824; Apx. 918-948; Apx. 950-1113; Apx. 1115-1133: Apx. 647-710).

Mr. Smith was diagnosed with an open comminuted left femur fracture.[2] (Apx. 584). Mr. Smith's fracture was stabilized with a variety of modalities (Apx. 1059-1060), and Dr. Schell made the decision in conjunction with the treatment team that Mr. Smith should be transferred to the University of Michigan Hospital (a level 1 trauma center) (Apx. 557; Apx 862). This decision was influenced by Mr. Smith's size, Botsford's limited capacity to care for someone of Mr. Smith's size – specifically, the hospital did not have CT equipment which would accommodate Mr. Smith – and the more extensive facilities available at the University of Michigan (Apx. 1056, 1071-1074).

Mr. Smith was placed in the ambulance for transfer (Apx. 515; Apx. 628; Apx. 1071-1074), and died approximately twenty-one minutes into the transfer. An autopsy report revealed that Mr. Smith died from extensive blood loss (Apx. 644-645).

Mr. Smith was single with no children (Apx. 1157-1165). His estate was represented by his adult sister. She brought suit against Botsford, alleging it violated subsection (b) of EMTALA by failing to stabilize Mr. Smith's emergency medical condition, a fractured femur, and by transferring Mr. Smith while his emergency medical condition was not yet stabilized. (Apx. 223-224). According to Petitioner, Mr. Smith demonstrated classic signs of hypovolemic shock and he was not "stabilized" within the meaning of EMTALA when he was placed in the ambulance, as he was actually bleeding (Apx. 223-224).

This case was tried for fifteen days in April, 2003. Twenty-two witnesses testified at the time of trial, including twelve physicians (most of whom offered expert medical testimony), one paramedic, and one nurse (Apx. 81). There was massive disagreement among the medical practitioners and experts on

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2. An open comminuted fracture is a break of the bone which pierces the skin and has multiple bone fragments in multiple locations (Apx. 570).

the core medical issues, including the state and significance of Mr. Smith's medical presentation, the appropriate medical decisions to be made, and the resulting consequences to the decedent.[3]

After hearing testimony, the jury was asked to sift through the facts and opinions and determine the propriety of the medical decision-making at Botsford. The jury was instructed that: (1) the duty to stabilize does not arise until the hospital diagnoses an emergency medical condition; (2) the question of whether Mr. Smith was stabilized prior to transfer is to be judged from the standpoint of a reasonable, objective observer; and (3) "to stabilize" is to provide such medical treatment of the condition as may be necessary to "assure within reasonable medical probability that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." (Apx. 1238-1241). The jury found that Botsford failed to stabilize Mr. Smith's emergency medical condition before he was transferred, that the estate suffered damages as a direct result of this failure, and that the estate was entitled to economic damages in the amount of $35,000.00, and noneconomic damages in the amount of $5.0 million (Apx. 232; Apx. 1242-1243). The trial court subsequently denied Botsford's post-trial motions, including a request that Michigan's damages cap be applied and the $5.0 million noneconomic damages award be reduced to Michigan's statutory limit, $359,000. (Apx. 64).

Appeal. On Botsford's appeal, the Sixth Circuit held that the Michigan malpractice cap, M.C.L. 600.1483, required that the noneconomic damages awarded to Petitioner be reduced to $359,000. In its unanimous published opinion, the Sixth Circuit

3. Given the medical complexities of the case and the number of medical practitioners and experts who testified, the jury was given a Medical Glossary to better understand the medical issues, including the definitions of hemorrhagic, hypovolemic/hypovolemia, shock/hypovolemic shock, morbid obesity, peripheral pulses, pulse oximeter, blood pressure, pulse, and vital signs (Apx. 101).

rejected Petitioner's initial argument that EMTALA does not incorporate state law damages caps under any circumstances.[4] 419 F.3d at 517. The Sixth Circuit then analyzed the narrow question of whether Michigan's specific damages cap applies to an EMTALA failure-to-stabilize claim. *Id.* at 518. As did the Fourth Circuit in *Power v. Arlington Hospital Association,* 42 F.3d 851, 860-862 (4th Cir. 1994), the Sixth Circuit considered whether Petitioner's EMTALA claim would be deemed a malpractice claim under the relevant state law. *Id.* The Sixth Circuit looked to *Bryant v. Oakpointe Villa Nursing Center,* 471 Mich. 411; 684 N.W.2d 864, 869 (2004), in which the Michigan Supreme Court had recently articulated the factors for determining whether a claim is one for medical malpractice: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." 419 F.3d at 518. The Sixth Circuit concluded that Michigan's damage cap applies to this EMTALA failure-to-stabilize claim because the claim would constitute a malpractice action under Michigan law. "Like the claims *Bryant* deemed malpractice actions, compliance with EMTALA's stabilization requirements entails medical judgment (assuring '*within reasonable medical probability,* that no material deterioration of the condition is likely,' 42 U.S.C. § 1395dd(e)(3)(A)) . . . understood . . . only through expert testimony." 419 F.3d at 519 (emphasis original). The Sixth Circuit was aware that Petitioner essentially conceded that her action was one for medical malpractice because she had filed a medical malpractice action against Botsford in a Michigan state court based on the same factual allegations. (Apx. 305, 312-318). The Sixth Circuit concluded that since Petitioner questioned Botsford's medical decision-making through the use of expert testimony, *Bryant,* Michigan's statutory damages cap for medical malpractice actions applied to this failure-to stabilize EMTALA claim.

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4. Petitioner does not seek review of this determination.

The Sixth Circuit next rejected Petitioner's Seventh Amendment challenge and adopted the reasoning of the Fourth Circuit in *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) ("If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well."). 419 F.3d at 513.

The Sixth Circuit further rejected Petitioner's equal protection challenge. The court noted that a Michigan appellate court already had found that Michigan's interest in controlling increases in healthcare costs is rationally related to its creation of a limitation on noneconomic damages to reduce the liability of medical care providers. 419 F.3d at 520, quoting *Zdrojewski v. Murphy*, 254 Mich. App. 50; 657 N.W.2d 721, 739 (2002).

The Sixth Circuit subsequently denied Petitioner's motion for rehearing and rehearing *en banc* through an order dated November 22, 2005. 419 F.3d at 513.

REASONS FOR DENYING THE PETITION

Petitioner's request for relief meets none of the invoked tests set forth in this Court's Rule 10, "Considerations Governing Review of Certiorari." The Sixth Circuit's decision does not conflict with the decision of another court of appeals on either of the issues presented. The Court of Appeals for the Sixth and Fourth Circuits agree that a state law damages cap applies to an EMTALA failure-to-stabilize case. No court of appeals decision, EMTALA or otherwise, holds that application of a state law damages cap violates either the right to jury trial of the Seventh Amendment, or the equal protection clause of the United States Constitution.

The Court of Appeals here has not decided an important question of federal law which should be settled by this Court, or decided a federal question in a way that conflicts with

applicable decisions of this Court. The Supreme Court does not have a stake in the correctness of federal decisions which are premises on resolution of underlying state-by-state decisions (in this case, Michigan's specific damages cap). *Lawrence v. Chater,* 516 U.S. 163, 177 (1996) (REHNQUIST, C.J., concurring and dissenting in part).

Petitioner's positions on the merits also lack merit, discussed next.

I. Michigan's cap on noneconomic medical malpractice damages applies to this failure-to-stabilize EMTALA judgment, pursuant to Congress' allowance of only "damages available for personal injury under the law of the State," 42 U.S.C. § 1395dd(d)(2)(A).

Damages under EMTALA are limited to those available under the applicable state law:

> "Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, *obtain those damages available for personal injury under the law of State in which the hospital is located*, and such equitable relief as is appropriate."

42 U.S.C. § 1395dd(d)(2)(I) (emphasis supplied).

In Michigan, recovery of noneconomic damages in a personal injury verdict based on allegations of medical malpractice is limited by M.C.L. 600.1483:

> "In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss

> recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 . . . ."

The monetary limitation is adjusted yearly and was $359,000.00 in 2003.

Petitioner argues that Michigan's particular state law damages cap, M.C.L. 600.1483, is inapplicable to EMTALA actions. Ignoring the wealth of case law that instructs the Court to analyze the nature and character of the EMTALA action in question, Petitioner assumes that all EMTALA actions are premised upon patient dumping, thus involve questions of strict liability, only, and therefore do not constitute "medical malpractice" actions to which Michigan's state law damages cap would admittedly apply. In so framing the question, Petitioner avoids addressing the fundamental question presented: whether Michigan's damages cap applies to this EMTALA action, premised on the failure to stabilize the patient.

Section § 1483 is *not* limited to "medical malpractice" actions, but applies "in an action for damages alleging medical malpractice," which includes any action challenging the exercise of medical judgment in the course of a professional relationship. *Bryant v. Oakpointe Villa Nursing Home,* 471 Mich. 411; 684 N.W.2d 864 (2004); *Dorris v. Detroit Osteopathic Hosp. Corp.*, 460 Mich. 26, 45-46; 594 N.W.2d 455 (1999)[5]. The Michigan courts have not limited such actions to those involving only the "full panoply of the physician's typical responsibilities to diagnosis and treat" a patient for medical conditions. *Dyer v. Trachtman,* 470 Mich. 45, 50-51; 679 N.W.2d 311 (2004).[6]

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5. Michigan law is also clear that Michigan state law damages cap applies to a wrongful death case grounded in allegations of medical malpractice. *Jenkins v. Patel,* 471 Mich. 158; 684 N.W.2d 346 (2004).

6. In *Dyer,* the Michigan Supreme Court held that an IME physician has a limited physician-patient relationship, that the physician's alleged

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When the complained-of conduct involves medical decisions, the allegations "raise questions involving medical judgment," and "fit within a medical malpractice cause of action." *Dyer* at 54.[7]

Petitioner's EMTALA complaint raises questions of medical judgment by asserting an inappropriate transfer under EMTALA for: (A) failure to stabilize the Petitioner's decedent; (B) failure to inform the legally responsible persons of obligations under EMTALA of the risks of transfer; (C) failure to provide medical treatment; (D) failure to call for and utilize appropriate transfer equipment to "reduce the risk to Petitioner's Decedent,"; and (E) failure to reassess the patient at the time of discharge to ensure that he was stabilized and thus an appropriate candidate for transfer. Paragraph 22 summarizes:

> "The Defendants [sic] failed to provide the medical treatment within its capacity to minimize the risk of transfer to Plaintiff's Decedent's health."

Apx. 34.

EMTALA's screening, treatment, and transfer requirements further demonstrate that a failure to stabilize challenge involves

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negligence sounds in medical malpractice, and that the physician was entitled to medical malpractice tort reform measures.

7. Plaintiff argues that the standard of care in a medical case is not *identical* to the standard of care imposed by EMTALA, and therefore Michigan's damages cap, limited to an "action alleging medical malpractice," is inapplicable. This is flatly incorrect because the Michigan Supreme Court has recognized that even if the relationship between the patient and the physician is nontraditional and does not involve the "full panoply of the physician's typical responsibilities to treat and diagnose," the case still is one for medical malpractice. *Dyer v. Trachtman, D.O.*, 470 Mich. at 50; 679 N.W.2d at 314-315 (2004).

medical decisions and medical judgment.[8] Sections 1395dd(b)(1)(A) and (B) require "such further medical examination and such treatment as may be required to stabilize the medical condition" before discharge or to transfer the person to another medical facility in accordance with EMTALA standards. "To stabilize" with respect to an emergency condition requires the provision of "medical treatment" to assure "no material deterioration," to be determined by the standard of "reasonable medical probability." § 1395dd(e)(3)(A).[9] Determination of an "emergency medical condition" likewise involves medical standards: "sufficient severity" and reasonable expectation. § 1395dd(e)(1)(A).

These statutory requirements involve medical decision-making and the exercise of medical judgment required "to provide such further medical examination and treatment as was required to medically treat an emergency medical condition." *Goodwin v. Memorial Medical Ctr.*, 25 P.3d 273, 287 (N.M. 2001).[10]

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8. The enforcement provisions of EMTALA, referencing "medical opinions" and "medical . . . quality of care," also demonstrate that medical decisions and medical judgment challenges are the heart of certain EMTALA actions. *See* addendum for 42 C.F.R. 489.2(h)(1)(v).

9. The standard of "reasonable medical probability" is an objective one, inextricably interwoven with the professional standard of care involved for rendering medical treatment. *Barris v. County of Los Angeles*, 972 P.2d 966, 974 (Cal. 1999).

10. This case is distinguishable from those in which an EMTALA claim does not involve medical decisions and the plaintiff does not complain of the exercise of medical judgment. EMTALA was enacted because Congress was concerned that hospitals might be "dumping" patients with emergency medical conditions because they lacked insurance or other means to pay their medical bills. *See generally Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 268 (6th Cir. 1990). As a result, a court might encounter a case

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Case law supports application of Michigan's damages cap to this failure-to-stabilize EMTALA suit. *Power v. Arlington Hosp. Assoc.*, 42 F.3d at 863, counsels courts to look to the substance of an EMTALA claim when deciding which state law remedies apply:

> "Courts must look at the underlying conduct challenged in the EMTALA case and the legal basis for the challenge to determine whether such a claim, if brought under state law, would be encompassed within the state's personal injury damage limitation, the medical malpractice damage cap, both or neither."

Other courts have reasoned that, although not identical to a state malpractice claim because it includes additional requirements, an EMTALA claim for failure-to-stabilize is premised on medical standards of care:

> "A plaintiff must prove that the hospital did not, within its available staff and facilities, provide a patient known to be suffering from an emergency medical condition with medical treatment necessary to assure, within reasonable medical probability, that no deterioration of the condition would likely occur. The standard of 'reasonable medical probability' is an objective one, *inextricably interwoven with the professional standard for rendering medical treatment.*

* * *

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where the only salient facts are a participating hospital's decision to discharge or transfer because the patient cannot pay the bill (*i.e.*, the patient is not insured). This is not such a case.

> The trier of fact must, under EMTALA *as in a medical negligence claim*, consider the prevailing medical standards and relevant expert medical testimony to determine whether material deterioration of the patient's condition was reasonably likely to occur."

Barris, 927 P.2d at 974-975 (emphasis supplied). Similarly, in *Goodwin* the court found that an EMTALA violation premised on failure-to-stabilize a subdural hematoma was essentially a claim that the hospital was required and did not "provide such further medical examination and treatment as was required to medically treat an emergency medical condition." 25 P.3d at 287.

Recognizing the difference between failure-to-stabilize and other EMTALA claims, *Burditt v. U.S. Dept. of Health & Human Services*, 934 F.2d 1362, 1369 (5th Cir. 1991) explained that the stabilization provision of EMTALA, more than the screening, requires the hospital to prevent the material deterioration of each patient's condition according to the capabilities of the particular hospital. This involves medical decision-making and the exercise of medical judgment.

As demonstrated in *Barris*, *Goodwin*, and *Burditt*, a failure-to-stabilize case is based on a professional standard of care. The underlying conduct complained of is in the nature of medical malpractice, which triggers Michigan's medical malpractice damages cap. Botsford's position is consistent with the holdings in cases finding similar state damages caps applicable to an EMTALA violation. *See Goodwin* (New Mexico cap relating to "all past and future medically and medically – related expenses applied to inappropriate medical screening/wrongful discharge EMTALA claims"); *Barris* (California's damages cap applicable to action for injury against health care provider "based on professional negligence" found applicable to an EMTALA failure-to-stabilize claim); *Power* (Virginia's cap "in an action

for malpractice" against healthcare provider found applicable to EMTALA claim of inappropriate medical screening); *Reid v. Indianapolis Osteopathic Medical Center,* 709 F.Supp. 853 (S.D. Ind. 1989) (Indiana's damages cap for injury or death of a patient found applicable to EMTALA violations of failure to stabilize and improper transfer).

Petitioner effectively conceded that this EMTALA case alleges medical malpractice. Petitioner filed a complaint against Botsford in the state court based on the same facts as the EMTALA complaint (Apx. 305). In *Smith v. Botsford General Hosp., et al.* (Wayne County Circuit Court No. 00-039336-NH), Petitioner asserted that Botsford and the relevant physicians were liable for "medical malpractice" (Count I) and breached the standard of care for trauma surgeons and trauma surgery residence in a same or similar community (Apx. 312-318). Under the *Power* test, there is no doubt that the underlying conduct in this action is medical malpractice, which is subject to Michigan's medical malpractice damages cap.[11]

Petitioner cannot escape her EMTALA allegations which are inextricably tied to the provision of health care. "Stabilization" relates directly to the provision of health care. "It is the treatment needed to prevent 'the threatening and severe consequences' of the patient's emergency medical condition." *Valencia v. St. Francis Hospital and Health Center,* 2004 W.L.

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11. The district court distinguished *Power v. Arlington Hosp. Ass'n*, 42 F.3d 841 (4th Cir. 1994), on the grounds that the cap in that case was not limited, as is the Michigan cap at issue, to an action for "medical malpractice," which requires that a plaintiff show a professional standard of care was breached (Apx 211-214). Virginia has a broad medical malpractice cap, which includes not only traditional medical malpractice claims, but also claims of battery and sexual misconduct by a physician, 42 F.3d at 861, but that difference is immaterial to the facts of this case. This EMTALA claim for failure to stabilize is based on professional negligence, which is subject to both Virginia's and Michigan's damages caps.

963712 (S.D. Ind., March 1, 2004), p. 7. Taking Petitioner's allegations as true, it is impossible to see how such allegations, if established, would lead to injury absent some act involving the provision of health care.

Again, this is not a case which was premised upon a set policy of the hospital turning away indigent patient because they lacked medical insurance. Rather, Petitioner acknowledges in her complaint that the decedent was seen by the staff at Botsford's emergency department, and alleged that Mr. Smith's death arose from the failure to provide adequate health care. Under the test enunciated in *Power, supra*, if these allegations were brought under state law (which actually occurred in this case when Petitioner filed her state law action against Botsford), they would be considered medical malpractice in nature.

Petitioner repeatedly asserts that an EMTALA case is "not a medical malpractice action" and is instead a "strict liability" action, to which Michigan's damages cap would not apply. This argument is misplaced on the law and on the facts of this case. Whereas liability under EMTALA is established by statute, Congress mandated that the damages be determined by the incorporated state law. In addition, a failure-to-stabilize theory under EMTALA does not constitute strict liability. *Summers v. Baptist Medical Ctr., Arkadelphia*, 91 F.3d 1132, 1140 (8th Cir. 1996) (because of the actual knowledge limitation, the stabilization provision, unlike the screening provision, does not impose strict liability). *Barris*, 972 P.2d at 972 (EMTALA imposes a limited duty of medical treatment). There may be cases in which EMTALA liability is premised solely upon a hospital's decision to discharge or transfer because the patient cannot pay the bill (i.e. literal "patient dumping"). EMTALA was enacted in part to deter such situations. *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 268 (6th Cir. 1990). *This is not such a case.* As demonstrated by the testimony presented in trial, the jury in this case – as it would in a medical negligence case – considered the prevailing medical standards

and relevant expert medical testimony to determine whether a material deterioration of Mr. Smith's condition was reasonably likely to occur. This is antithetical to strict liability, as noted by the Court in *Barris*, 972 P.2d at 975:

> "[A] stabilization claim under EMTALA is based on whether the hospital, within the staff and facilities available to it, provided medical treatment necessary to assure 'within medical probability' that no material deterioration of a patient's condition would occur during transfer to another facility. Strict liability, *by contrast*, would automatically impose responsibility for an injury to the patient, *regardless of the treatment given*. Nor does EMTALA require proof of a hospital's intentional refusal of care e.g., based on a patient's inability to pay or other bad faith motive."

(Emphasis supplied). *See also* and compare and contrast to *Bryant,* 471 Mich. at 425-426 (assertion of "strict liability" in a medical setting consists of allegation that defendant failed to provide an accident-free environment, which is different from an assertion that a breach of duty caused injury to the plaintiff).

Petitioner argues that Michigan's medical malpractice damages cap is inapplicable because Congress limited recovery of individual plaintiffs to "those damages available for *personal injury* under the law of the State." 42 U.S.C. § 1395dd(d)(2)(A) (emphasis supplied). "Personal injury" refers to actions in tort rather than another type of civil action (*Black's Law Dictionary*, p. 707(4th ed.) (1979), and thus includes those alleging medical malpractice. In states such as Michigan, which restrict recovery in actions alleging medical malpractice, the amount of damages that would be "available" for such a personal injury claim against a health care provider would be only those damages available within the damages cap. *See Reid v. Indianapolis Osteopathic*

Medical Hosp., Inc., 709 F.Supp. 853, 855-856 (S.D. Ind. 1989). There is no need for Michigan's damages cap to employ the broader "personal injury" definition when the allegations and proofs of this case fits squarely into the "in an action alleging medical malpractice" language of M.C.L. 600.1483.

II. Application of Michigan's cap on noneconomic medical malpractice damages does not violate the Seventh Amendment to the United States Constitution.

The first step in the constitutional analysis is to identify the scope of the right as enumerated in the Federal Constitution. The Seventh Amendment to the United States Constitution provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Petitioner contends that M.C.L. 600.1483 unconstitutionally infringes the right of trial by jury because it deprives Petitioner of certain decisions made by the jury.

It is by now axiomatic that the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.* 438 U.S. 59, 88 n. 32 (1978), *quoting Silver v. Silver*, 280 U.S. 117, 122 (1929). A legislature's outright abolition of a cause of action would not violate the Seventh Amendment. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235 (1917); *Dimond v. District of Columbia*, 792 F.2d 179, 190 n. 7 (D.C. Cir. 1986). If a legislature may completely abolish a cause of action without violating the right of trial by jury, it may permissibly limit damages recoverable for a cause of action as well. *Cf. Dimond*, 792 F.2d at 190 n. 7.

Petitioner presupposes that the right to trial by jury includes two components: (1) the right of the jury to determine the facts with respect to the amount of damages sustained; *and* (2) the right of the jury to dictate the legal consequences of its factual determination. It simply does not. The function of the jury extends solely to findings of fact and not to questions of law or public policy. *Tull v. United States*, 482 U.S. 412; 107 S. Ct. 1831; 95 L. Ed. 2d 365 (1987).

In *Tull*, this Court noted that nothing in the Seventh Amendment suggests that the right to a jury trial extends to the remedy phase of a civil trial. The *Tull* Court reasoned that the determination of the remedy in a civil trial could not be said to involve the substance of a common law right to a trial by jury nor a fundamental element of a jury trial. *Id.* at 426. Justice Stevens noted in his concurrence to *Gasperini v. Center for Humanities*, 518 U.S. 415; 116 S. Ct. 2211, 2227; 135 L. Ed. 2d 659 (1996) that:

> "It is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence *or because an award of damages is larger than permitted by law.*"

(Emphasis supplied.)

When examining the Michigan Constitution right to jury trial,[12] the Michigan Supreme Court rejected a similar argument and found that Michigan's rental car damages cap does not offend the constitutional right to jury "because the amount the plaintiff actually receives was never within those things a jury

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12. "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Michigan Const. 1963, art. 1 § 14.

can decide." *Phillips v. Mirac, Inc.*, 470 Mich. 415, 429-430; 685 N.W.2d 174 (2004). The *Phillips* Court reasoned: "[d]amage caps are constitutional in causes of action springing out of the common-law because the Legislature has the power under our Constitution to abolish or modify non-vested, common-law rights and remedies." In *Phillips*, the Court explained that the Michigan Legislature's restriction on a defendant's liability through the use of a damages cap only limits the legal consequences of the jury's finding regarding liability, and thus a plaintiff's right to jury trial is not implicated:

> "Like the congressional imposed civil penalties discussed in *Tull v. United States*, 481 U.S. 412, 426 (1987), the Michigan Legislature's limits on defendant's liability do not involve the 'substance of a common-law right to a trial by jury,' or a 'fundamental element of a jury trial.' (Citations deleted). Those are things that are not under the umbrella of the right. In other words, M.C.L. 257.401(3) only limits the *legal* consequences of the jury's finding regarding the liability. Plaintiff's right to a jury trial is not implicated. She has had a jury trial and the jury determined the facts of her case. The jury's function is complete. It is up to the Court to determine the legal effect of those findings, whether it be that her damages are capped, reduced, increased, tripled, reduced to present value, or completely unavailable."

Phillips, 470 Mich. at 431 (emphasis original).

In *Murphy v. Edmonds*, 325 Md. 342; 601 A.2d 102 (1992), plaintiffs claimed that a $350,000 cap on noneconomic damages in personal injury actions violated their right to a jury trial under Maryland's Declaration of Rights because it interfered with the jury's ability properly to determine damages and with the jury's

exclusive province in determining factual issues. The Maryland Court of Appeals disagreed, stating:

> "[T]he jury trial right in civil cases relates to 'issues of fact' in legal actions. It does not extend to issues of law, equitable issues, or matters which historically were resolved by the judge rather than by the jury.
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> * * *
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> Moreover, the constitutional right to a jury trial is concerned with whether the court or the jury shall decide those issues which are to be resolved in a judicial proceeding.
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> * * *
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> Where, however, the [legislature] has provided that a matter shall not be resolved in a judicial proceeding, by legislatively abrogating or modifying a cause of action, no question concerning the right to a jury trial arises. Since, under such circumstances, the matter will not be resolved in a judicial proceeding, the question as to whether a judge or a jury shall resolve the matter simply does not arise."

Murphy, 601 A.2d at 371-72.

In *Boyd v. Bulala,* 877 F.2d 1191 (4th Cir. 1989), the Fourth Circuit reversed the district court's judgment that Virginia's cap on recovery in an action for medical malpractice unconstitutionally denied plaintiffs their right to a jury trial. The Fourth Circuit agreed with the district court that the role of the jury is to determine the facts, but nonetheless upheld the damage cap stating:

> "[I]t is not the role of the jury to determine the legal consequences of its factual findings . . . That is a

> matter for legislature, and here, the Virginia legislature has decided that as a matter of law damages in excess of $750,000 are not relevant. In doing so it has not violated the Seventh Amendment."

Boyd, 877 F.2d at 1196.

In *Etheridge v. Medical Center Hospitals,* 237 Va. 87; 376 S.E.2d 525 (1989), the Supreme Court of Virginia upheld a statute limiting the amount of damages which may be received in a medical malpractice action against a constitutional challenge, reasoning "[a]lthough a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." *Etheridge,* 376 S.E.2d at 529.

In *Franklin v. Mazda Motor Corp,* 704 F.Supp. 1325 (D.Md. 1989), the Court held that "a legislature adopting a prospective rule of law that limits *all* claims for pain and suffering in *all* cases in not acting as a factfinder in a legal controversy . . . . The right of jury trials in cases at law is not impacted." *Franklin, supra* at p 1331 (emphasis supplied). *See also Madison v. IBP, Inc.,* 257 F.3d 780, 804 (8th Cir. 2001) where the Court explained:

> "Congress created the Title VII cause of action and has the power to set limits for recovery under it. The statute does not violate the Seventh Amendment because it does not impinge upon the jury's factfinding function. In applying a provision, a court does not 'reexamine' the jury's verdict or impose its own factual determination as to what a proper award might be. Rather, it implements the legislative policy decision by reducing the amount recoverable to that deemed to be a reasonable maximum by Congress."

The Michigan Court of Appeals has specifically rejected a right to jury trial constitutional challenge to M.C.L. 600.1483. *Zdrowjewski v. Murphy, M.D.*, 254 Mich.App. 50, 76-77; 657 N.W.2d 721 (2002) (court rejects plaintiff's constitutional argument that she had unfettered right to recover precisely what the jury awarded; legislature has authority to limit remedies in tort actions, and section 1483 neither impedes plaintiff's ability to present her case to a jury or the jury's ability to determine the factual extent of plaintiff's damages).

These cases are consistent with this Court's reasoning in *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935), that "the controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts."

Petitioner relies upon the district court opinion *Boyd v. Bulala*, 672 F.Supp. 915 (W.D. Va. 1987), *rev'd* 877 F.2d 1191 (4th Cir. 1989) for the proposition that a state law damages cap violates the right to trial by jury under the Seventh Amendment. In *Boyd*, however, the Fourth Circuit *reversed* this finding upon reasoning that it is not the role of the jury to determine the legal consequences of its factual findings, but rather a matter for the legislature, as reflected in Virginia's damages cap.[13]

Petitioner contends application of Michigan's damages cap also violates the Reexamination Clause of the Seventh Amendment ("no fact tried by a jury shall be otherwise reexamined in any Court . . . ."). This argument is not preserved for appellate review because it was not presented to the District Court (Apx. 392-395), and it was not raised specifically before

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13. The federal right to jury trial is analyzed no different then the Michigan right to jury trial. *Tull v. United States*, 482 U.S. 412 (1987). The Fourth Circuit endorsed Botsford's view that the state appellate court decisions analyzing the state's own damages cap are persuasive on challenges to federal constitutional provisions.

the Sixth Circuit. (*See* Petitioner's App. Brief, pages 35-36). *Anschultz Land and Livestock Company, Inc. v. Union Pacific Railroad Company,* 820 F.2d 338, 344 n.5 (10th Cir. 1987) (propounding new arguments on appeal undermines important judicial values); *Lyons v. Jefferson Bank & Trust,* 994 F.2d 716, 721 (10th Cir. 1993) ("[t]he touchstone on this issue is that 'vague, arguable references to [a] point in the district court proceedings do not . . . preserve the issue on appeal'").

If preserved, this issue nonetheless should not be reviewed because Petitioner fails to identify a split in the circuits (indeed, fails to identify a single supporting case in this context) and is otherwise incorrect on the merits.

Petitioner admits that the only circuit court to address this issue held against Petitioner's position. In *Davis v. Omitowoju,* 883 F.2d 1155, 1161-1162 (3rd Cir. 1989), the Third Circuit reasoned that the Reexamination Clause is "primarily concerned with actions by the courts and . . . does not restrict the power of the Legislature . . . in enacting the malpractice damage cap at issue . . . ." *See also, Evans ex rel Kutch v. State of Alaska,* 56 P.3d 1046, 1051, note 30 (Alas. 2002) ("[t]he decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury"). Petitioner does not contest that Congress specifically incorporated state law remedies in EMTALA, and in doing so allowed implementation of the policy behind Michigan's damages cap. Because applying Michigan's cap to the damages award in this case implements a legislature's policy decision as to the amount of allowable damages, rather than allowing judicial reexamination of a verdict, application of the cap is outside the scope of the Reexamination Clause.[14]

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14. Petitioner cites *Lakin v. Senco Products, Inc.,* 987 P.2d 463, 471-473 (Or. 1999) as authority that a legislative cap on noneconomic damages violates the state constitution's reexamination clause. (Cont'd)

III. Application of Michigan's cap on noneconomic medical malpractice damages does not violate the equal protection clause of the United States Constitution.

The equal protection clause of the United States Constitution provides that no person shall be denied the equal protection of the law.[15] It is well-established that the equal protection guarantee is not a source of substantive rights or liberties; rather, it is a measure of the Constitution's tolerance of government classification schemes. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 58 (1973) (Stewart, J., concurring).

In *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985), this Court refused to disturb the California Supreme Court's determination that a state medical malpractice damages cap does not contravene the equal protection clause of the Federal Constitution. The state court acknowledged that the legislature may expand or limit recoverable damages so long as the action is rationally related to a state interest, and further found that the damages cap was a rational response to the problem of rising

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(Cont'd)

Lakin does not contain a reexamination issue, nor does Oregon's constitution contain a reexamination clause ("In all civil cases the right of Trial by Jury shall remain inviolate)."

The *Lakin* rationale has been soundly criticized by several courts. *Evans ex rel Kutch v. State of Alaska,* 56 P.3d 1046, 1051, note 30 (Alas. 2002); *Gourley ex rel Gourley v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43, 75 (Neb. 2003); *Kirkland v. Blaine County Medical Center,* 4 P.3d 1115, 1120 (Idaho 2000).

15. The Michigan courts have held that the Michigan and federal equal protection clauses offer similar protection and are coextensive. *Doe v. Dept. of Social Services,* 439 Mich. 650, 670-671; 487 N.W.2d 166 (1992); *Neal v. Oakwood Hosp. Corp.*, 226 Mich. 701, 716; 575 N.W.2d 68 (1997).

medical malpractice insurance costs. Similarly, this Court found that the damages cap did not improperly discriminate between medical malpractice plaintiffs and other tort plaintiffs, or within the class of medical malpractice plaintiffs, by denying full recovery to those with noneconomic damages exceeding the cap amount. The *Fein* Court found that the California Legislature's decision to limit the application to medical malpractice cases, and within those cases to those with large noneconomic damages awards, was a rational response to escalating malpractice insurance rates. For similar reasons, the Michigan Court of Appeals has already determined that § 1483 is not violative of the federal equal protection clause. *Zdrowjewski,* 254 Mich.App. at 80-81.[16] *See also Jenkins v. Patel,* 471 Mich. 158; 684 N.W.2d 346 (2004).

Petitioner resists this conclusion by arguing that "intermediate scrutiny" applies. In *Zdrowjewski, supra,* the Court refused to apply heightened scrutiny upon determining that classification schemes created by various tort reform legislation are social or economic legislation, subject to the rational basis test. *Zdrowjewski,* 254 Mich.App. at 79-80.[17] *See also Phillips,* 470 Mich. at 433-434 (the claimed right to have a jury assessment of damage, unmodified as a matter of law, is subject to the rational basis test because the subject right or legislation is social or economic in nature).

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16. "By limiting at least one component of health care costs, the noneconomic damages limitation is rationally related to its intended purpose. Because the noneconomic damages cap of M.C.L. 600.1483 is rationally related to a legitimate governmental purpose, the statute does not violate Petitioner's right to equal protection."

17. In *Neal, supra,* the Michigan Court of Appeals analyzed Section 1483 under the rational basis test upon recognizing a damages cap constitutes social or economic legislation, and does not create an inherently suspect, or even suspect classification. 226 Mich. App. at 717.

Finally, Petitioner argues that the damages cap violates equal protection under the rational basis test because of the ceiling imposed by the Michigan Legislature, namely $280,000.00, is lower then ceilings applied to other damages caps in Michigan, namely the product liability cap (at $500,000.00). Petitioner is wrong on the facts because the limitation on damages for noneconomic loss found at § 1483 is adjusted by the state treasurer each year and, for the case in question, equals $359,000.00. More fundamentally, Petitioner is asking this Court to test the wisdom of the Michigan Legislature in setting the precise noneconomic damages limitation. The rational basis test does not involve the wisdom, need or appropriateness of legislation. On the contrary, the Court examines the purpose for which legislation was enacted, not its effects. *Duke, supra,* 438 U.S. at 83-84 ("that the accommodations struck may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.").

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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